

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-2108

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RONALD JACKSON, et al.,
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Appellants,
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-against-
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STATE OF CONNECTICUT,
:
:
Appellee.
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Docket No. 76-2108

BRIEF FOR APPELLANTS
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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Docket No. 76-2103

BRIEF FOR APPELLANTS
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

QUESTION PRESENTED

Whether there are any non-frivolous issues to be raised
on appeal for review by this Court, and whether the case is
moot.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the District of Connecticut (The Honorable Jon O. Newman) entered on July 1, 1976, dismissing without a hearing appellants' application for a writ of habeas corpus. On September 3, 1976, the court below granted appellants' pro se application for a certificate of probable cause.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Federal Proceedings

On June 30, 1976, appellants Ronald Jackson, Melvin Jones, Douglas Thomas, John Kohler, Bruce Rogers, and Lindsey Johnson filed a writ of habeas corpus with the United States District Court for the District of Connecticut.¹ The petitioners alleged that they were incarcerated awaiting trial in the Supreme Court of Connecticut for more than 45 days without having

¹The petition is included as "C" to the separate appendix to appellants' brief.

received a bail hearing under General Statutes of Connecticut §54-53(a). That statute requires that defendants in custody and unable to make bail be afforded a bail review hearing within 45 days. The petitioners alleged that the Connecticut Supreme Court was "dragging its feet" in the review of the bail matters in an attempt to moot the issue, in violation of petitioners' rights under the Eighth and Fourteenth Amendments. Petitioners alleged that by failing to grant a hearing, the court had lost jurisdiction over their cases, and petitioners therefore requested discharge of their cases. The petition closed as follows:

The question before this Honorable Court is: "The legislative intent regarding Statute, 54-53(a)." With due respect to the judicial department of the State of Connecticut questions before any Superior or Supreme Court is never what the legislature actually intended, but what intention it expressed.

On July 1, 1976, the court below denied the application on the following jurisdictional ground:²

Petitioners, state pre-trial detainees, complain that they have not been provided the bail hearing required by Conn. Gen. Stat. §54-53(a). Even assuming that petitioners have exhausted their state judicial remedies, a fact not evident from their papers, this Court lacks jurisdiction to hear the claim that the state courts have erred in their construction and application of the state law in their cases. There is no claim that the bail set in petitioners' cases is so excessive as to violate the Constitution.

(Citations omitted).

²The opinion of the District Court is "B" to the separate appendix to appellants' brief.

On September 3, 1976, the District Court granted appellants' application for a certificate of probable cause.

B. The State Proceedings

While the above constitutes the entire record before the District Court, the following additional facts have been determined from an examination of the state court proceedings involving the six appellants.

Appellant Ronald Jackson was convicted on a plea of guilty on the charge against him on September 15, 1976, and the sentence imposed was to run concurrently with a sentence he was already serving (see appellants' separate appendix "D").

Appellant Melvin Jones was convicted on a plea of guilty of murder on October 1, 1976, and is currently serving an 18-year to life sentence on that conviction (see appellants' separate appendix "E").

Appellant John Kohler was convicted on his plea of guilty to escape on July 2, 1976, and was sentenced to one to two years' imprisonment on that charge. He was also sentenced on that date to two to five years' and one to two years' imprisonment pursuant to pleas of guilty to risk of injury and carrying a dangerous weapon without a permit (see appellants' separate appendix "F").

Appellant Douglas Thomas was convicted on July 2, 1976, on his plea of guilty to kidnapping and attempted burglary,

and was sentenced to from seven to fourteen years for kidnapping and from one to five years for burglary (see appellants' separate appendix "G").

Appellant Bruce Rogers was convicted on June 29, 1976, on his plea of guilty to robbery, and was sentenced to from three to seven years on that conviction (see appellants' separate appendix "H").

Appellant Lindsay B. Johnson was found guilty on November 2, 1976, by a jury, of attempted murder, kidnapping, robbery, and sexual assault. The sentence hearing in this case has been scheduled for November 24, 1976.

The record also shows that Johnson was incarcerated on January 6, 1976, when he was unable to post \$100,000 bail. On March 15, 1976, after the 45-day period had expired, Johnson moved to have his case dismissed for failure of the court to follow Connecticut General Statute §54-53(a). The motion for discharge was denied on March 26, 1976. However, on that day a bail hearing in fact was held, and Johnson's bail was reduced from \$100,000 to \$50,000 (see appellants' separate appendix "I"). Upon the jury's verdict of guilty, the court increased Johnson's bail from \$50,000 to \$100,000.

I

THE CASE IS MOOT AS TO FIVE OF THE APPELLANTS, AND WILL BECOME MOOT ON NOVEMBER 24, 1976, AS TO THE FINAL APPELLANT.

The petition for writ of habeas corpus filed by the six appellants alleges that they were illegally incarcerated due to the failure of the State of Connecticut to provide them with a timely bail review hearing. To the extent this petition can be said to raise constitutional issues, the claim of appellants must be that the State, by arbitrarily ignoring its own statutes, acted in violation of appellants' right not to be held under excessive bail and that their continued custody because of their failure to raise bail was illegal. While excessive bail is an issue that may be raised on habeas corpus (see, e.g., Sheldon v. State of Nebraska, 401 F.2d 342, 346 (8th Cir. 1968)), absent an allegation of prejudice to the defense by the denial of bail affecting the validity of the conviction, it is an issue that is moot once a defendant is in custody pursuant to a valid judgment of conviction, rather than pursuant to the bail set by the trial court. See, e.g., Parker v. Estelle, 498 F.2d 625, 629 (5th Cir. 1974), cert. denied, 421 U.S. 963 (1965); Medina v. State of California, 429 F.2d 1392 (9th Cir. 1970); Sheldon v. State of Nebraska, supra; Manning v. Jones, 385 F.Supp. 312, 315 (E.D.N.C. 1974); Bowring v. Cox, 334 F.Supp. 334 (W.D. Va. 1971); Hernandez v.

Wainwright, 296 F.Supp. 591 (M.D. Fla. 1969); Smith v. Warden, 280 F.Supp. 827, 831 (D. Md. 1969); Taylor v. King, 272 F.Supp. 53 (N.D. W.Va. 1967). Here, there was no allegation of any prejudice to the defenses of the six appellants as a result of the denial of a bail hearing.

There is no doubt that the case is moot with respect to five of the six appellants. Appellant Ronald Jackson was convicted on September 15, 1976; appellant Melvin Jones was convicted on October 1, 1976; appellant John Kohler was convicted on July 2, 1976; appellant Douglas Thomas was also convicted on July 2, 1976; and appellant Bruce Rogers was convicted on June 29, 1976.

With respect to Lindsay Johnson, the sixth appellant, the record shows that Johnson was found guilty by a jury on November 2, 1976, of the charges of attempted murder, kidnapping, robbery, and sexual assault, with sentencing scheduled for November 24, 1976. Thus, it is likely that before the due date of respondent's brief to this Court, the case will be moot as to appellant Johnson as well. However, since Mr. Johnson is currently being held on \$100,000 bail pending sentencing, his case is not moot as of this date, and counsel will proceed to an analysis of whether appellant Johnson's claim is one upon which relief may be granted.

II

IN ANY EVENT, APPELLANTS' PETITION,
AS PRESENTLY WORDED, FAILS TO SET
FORTH A CLAIM UPON WHICH RELIEF MAY
BE GRANTED.

Appellants claimed that they were not provided with timely bail review hearings, as required by Connecticut General Statute, §54-54(a), and that, as a result, the court lost jurisdiction over their cases.³ Appellants also alleged that the State had erred in the construction of Connecticut General Statute §54-53(a). Counsel is forced to conclude that neither of these claims constitutes grounds for habeas corpus relief.

If the failure to hold a 45-day hearing can be said to have deprived the court of jurisdiction, that loss of jurisdiction could occur only as a result of the operation of that state law. There is no federal constitutional provision that

³Connecticut General Statute §54-53(a) provides as follows:

No person who has not made bail shall be detained in a community correctional center pursuant to the issuance of a bench warrant, or for arraignment, sentencing or trial for an offense not punishable by death, for longer than forty-five days, unless at the expiration of such forty-five days he is presented to the court having cognizance of the offense. On each such presentment, such court may reduce, or may for cause shown remand such person to the custody of the Commissioner of Correction. On the expiration of each successive forty-five day period, such person may again by motion be presented to the court for such purpose.

enables dismissal of an action solely on the ground of excessive bail. Appellants' claims that they are entitled to a dismissal therefore concern violations of state law, and are not available in this habeas corpus action. See, e.g., United States ex rel. Little v. Twomey, 477 F.2d 767, 770 (7th Cir.), cert. denied, 414 U.S. 846 (1973) (violation of Illinois requirement that defendant be brought to trial within 120 days does not establish federal constitutional claim); Glucksman v. Birns, 398 F.Supp. 1343, 1350 (S.D.N.Y. 1975) (improper determination of venue involving question of whether court had jurisdiction; absent showing of arbitrariness or erroneous factual findings, no federal claim); Odom v. Israel, 372 F.Supp. 1310 (E.D. Ill. 1974); Delph v. Slayton, 343 F.Supp. 449, 452-453 (W.D. Va. 1972), affirmed, 471 F.2d 648 (4th Cir. 1973) (claim that state lost jurisdiction because of release to federal authorities of defendant).

Moreover, the statute has been interpreted by the Supreme Court of Connecticut as not providing for a dismissal in the event of a failure to hold a hearing within 45 days. In State v. Olds, 38 Conn. L.J. No. 6, August 10, 1976, at 8, the Supreme Court held as follows, on a challenge to a judgment of conviction on the ground of violation of §54-53(a):⁴

⁴A copy of the opinion is annexed as "J" to the separate appendix to appellants' brief.

The right to be released on bail upon sufficient security is a fundamental constitutional right, and any order made by the trial court denying or fixing the amount of bail is subject to appellate review. Conn. Const., art. I §8; Practice Book §694. On the other hand, §54-53a only purports to mandate the procedure for implementing this right and provides no sanction in the event there is a violation. The denial of any right under the statute does not involve a fundamental constitutional right, and the defendant has made no showing of prejudice which would entitle him to a dismissal of the information. On July 2, 1974, the defendant filed a motion requesting that he be released without bail or, in the alternative, that his bail be fixed at \$2500. The motion was denied and on the same day he entered a plea of not guilty. It was not until August 22, 1974, that the defendant filed the motion to dismiss. It does not appear that the defendant at any previous time requested that the amount of his bail be reviewed. The court did not err in denying the motion to dismiss.

As the court below noted, a claim that the State has erred in the interpretation of its own law is not ordinarily a ground for federal habeas corpus relief. Howard v. Kentucky, 200 U.S. 164, 172-173 (1906); United States ex rel. Sadowy v. Fay, 284 F.2d 426, 427 (2d Cir. 1960), cert. denied, 365 U.S. 850 (1961); 28 U.S.C. §§2241, 2254. In fact, in determining the meaning of a state bail rule, the federal courts are bound by the interpretation of the rule by the highest court of the State. Turco v. Maryland, 324 F.Supp. 61 (D. Md. 1971), affirmed, 444 F.2d 56 (4th Cir. 1971).

The court below found that appellants' petition did not allege that bail was excessive. However, pro se petitions

for writ of habeas corpus should be liberally construed. Stubbs v. Smith, 539 F.2d 64 (2d Cir. 1976); see Darr v. Burford, 339 U.S. 200, 203-204 (1950). Since appellants' claim alleges that the State's failure to give a hearing violated the Eighth and Fourteenth Amendments, it may be construed as a claim that the State's arbitrary administration of its bail right deprived appellants of their right to be free from excessive bail. Turco v. Maryland, supra; see In re Shuttlesworth, 369 U.S. 35 (1962).

Treating appellant Johnson's claim in this manner, we submit, would still fail to entitle him to relief. If the State was arbitrary in denying a hearing, the proper recourse would seem to be to grant one. The record shows that such a hearing, albeit after the 45-day period, was granted to appellant Johnson, and his bail was reduced from \$100,000 to \$50,000. Since there is neither any claim nor any evidence that appellant Johnson's \$50,000 bail was excessive, there is simply no argument that his rights under the Eighth and Fourteenth Amendments was violated.

CONCLUSION

For the foregoing reasons, the case is moot and there are no non-frivolous issues to be raised for this Court's review; accordingly, the motion of The Legal Aid Society, Federal Defender Services Unit, to be relieved as counsel, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

November 12, 1916

I certify that a copy of this brief and appendix
has been mailed to the Attorney General of the State
of ~~New York~~ Connecticut

David F. Gottlieb